

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRIAN LEE SMITH,

Defendant-Appellant.

UNPUBLISHED

March 25, 2014

No. 313927

Eaton Circuit Court

LC No. 12-020048-FC

Before: RONAYNE KRAUSE, P.J., and FITZGERALD and WHITBECK, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions, following a jury trial, of two counts first-degree criminal sexual conduct, MCL 750.520b(1)(a) (victim under 13), and two counts of second-degree criminal sexual conduct, MCL 750.520c(1)(a) (victim under 13). Defendant was sentenced to serve concurrent prison terms of ten to thirty years for each CSC I conviction, and five to fifteen years for each CSC II conviction. We affirm.

The three alleged victims all report that incidents of sexual abuse happened when defendant was in a dating relationship and living with their mothers. The first two victims – sisters – were respectfully nine and twelve years of age at the time the offenses happened, in 2002. The third victim reports being sexually assaulted by defendant in 2006, when she was nine years of age.

On appeal, defendant first argues that the jury’s verdict was against the great weight of the evidence, on the grounds that because the victims’ testimonies were seriously impeached and marked by inconsistencies and discrepancies to such a degree that they cannot legally support the convictions. We disagree.

Defendant did not object to victims’ testimonies at trial; therefore, this issue was not preserved. Unpreserved issues are reviewed for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999). To avoid forfeiture for plain error, the defendant carries the burden of proving the following: (1) there was an error, (2) the error was clear or obvious, and (3) the plain error affected substantial rights. *Id.* at 763. Where plain error is shown, reversal is warranted only if it seriously affected the integrity of the judicial proceedings or resulted in the conviction of an actually innocent person. *Id.* at 763-764.

“The test to determine whether a verdict is against the great weight of the evidence is whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand.” *People v Lacalamita*, 286 Mich App 467, 469; 780 NW2d 311 (2009). A new trial on this ground is generally permissible only when the evidence does not reasonably support the verdict, and the verdict was “more likely the result of causes outside the record, such as passion, prejudice, sympathy, or some other extraneous influence.” *Id.* However, the trial court may not normally grant a motion for a new trial on the basis of credibility determinations because “the trial court may not substitute its view of the credibility” for that of the jury. *People v Lemmon*, 456 Mich 625, 642-643; 576 NW2d 129 (1998). The jury is responsible for determining questions of credibility. *People v Harrison*, 283 Mich App 374, 378; 768 NW2d 98 (2009). An appellate court should likewise not interfere with the jury’s role in determining credibility and weight of the evidence. *People v Wolfe*, 440 Mich 508, 514; 489 NW2d 748, amended on other grounds 441 Mich 1201 (1992). The testimony of a victim in a CSC case need not be corroborated by other evidence to support a conviction. MCL 750.520h; *People v Phelps*, 288 Mich App 123, 132; 791 NW2d 732 (2010).

As defendant acknowledges, the instant case “turned solely on the credibility of the complainants.” And the jury is responsible for determining what inferences to draw from the evidence and how much weight to give them. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). A defendant’s view of witness credibility is not itself a basis for the trial court to grant a motion for a new trial, given the duty to defer to the jury’s factual determinations. *Lemmon*, 456 Mich at 642-643.

The case involved three young victims. K.R. testified that defendant fondled her vagina on two separate occasions. E.M. testified that defendant touched her breasts and inserted a finger into her vagina. L.T. testified that defendant inserted a finger into her vagina. Although there were inconsistencies in the testimony concerning some of the details, the accounts of sexual assault to which each victim testified were consistent. Again, a victim’s testimony is sufficient on its own to support a CSC conviction. *Phelps*, 288 Mich App at 132. As stated in MCL 750.520h, “[t]he testimony of a victim need not be corroborated in prosecutions” for criminal sexual conduct. The minor inconsistencies of which defendant makes issue did not rise to the level whereby the verdict must be deemed to have depended on testimony that was “patently incredible or defies physical realities,” nor were the complaining witnesses’ accounts “seriously impeached and the case marked by uncertainties and discrepancies.” *Lemmon*, 456 Mich at 643-644 (internal quotation marks and citations omitted). For these reasons, the trial court did not commit plain error by declining sua sponte to entertain a motion for a new trial predicated on the great weight of the evidence. See *Carines*, 460 Mich at 763-764.

Next, defendant argues that the prosecutor committed misconduct during closing argument by commenting on defendant’s silence or otherwise improperly shifting the burden of proof. We disagree.

There was no objection below to the prosecutorial commentary of which defendant here makes issue, leaving the issue unpreserved. Review is, therefore, for plain error affecting substantial rights. *Carines*, 460 Mich at 763-764; *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008); *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008). Accordingly, this Court is precluded from reviewing prosecutorial misconduct “unless the

defendant timely and specifically objects, except when an objection could not have cured the error, or a failure to review the issue would result in a miscarriage of justice.” *Id.* at 234-235 (internal quotation marks and citation omitted).

Claims of prosecutorial misconduct must be evaluated on a case-by-case basis. *People v Mann*, 288 Mich App 114, 119; 792 NW2d 53 (2010). Comments must be considered as a whole in light of all the facts, including the defense arguments and how the comments relate to the evidence presented. *Brown*, 279 Mich App at 135. A prosecuting attorney is free to argue any reasonable inference that may arise from the evidence. *People v Bahoda*, 448 Mich 261, 282; 792 NW2d 53 (1995). A prosecuting attorney need not confine argument to the blandest terms available. *People v Dobek*, 274 Mich App 58, 66; 732 NW2d 546 (2007).

The prosecutor carries the burden of proof in a criminal trial, and so must prove the defendant’s guilt beyond a reasonable doubt. *People v Likine*, 492 Mich 367, 407; 823 NW2d 50 (2012). It is misconduct for a prosecuting attorney to attempt to shift the burden of proof by commenting on the defendant’s failure to present evidence. *People v Abraham*, 256 Mich App 265, 273; 662 NW2d 836 (2003). However, there are times when a prosecutorial remark or comment that would otherwise be error is permissible as merely responding to the arguments of the defense. *People v Watson*, 245 Mich App 572, 593; 629 NW2d 411 (2001).

Defendant makes issue of the following commentary the prosecuting attorney offered during closing argument:

Here the defendant, the testimony is that he touched [K.R.’s] vagina outside her underwear when she was nine and ten years old. There is no testimony that he is a medical doctor or that he was applying any kind of ointment or any kind of doing a, you know, conducting any kind of examination that he would be qualified to conduct.

So I think if you look his actions and what was going on and his other qualifications, so to speak, there is no other possible reasonable explanation for what he was doing. And I think you can take that as, it can reasonably be construed as being done for a sexual purpose.

Defendant maintains that this comment shifted the burden of proof to defendant, and was otherwise an inappropriate comment on defendant’s silence. However, comments must be considered as a whole in light of all the facts and how the comments relate to the evidence presented. *Brown*, 279 Mich App at 135. Just before the allegedly inappropriate comment, the prosecuting attorney was discussing the elements of CSC. The prosecuting attorney then said, “So I want to talk just now about for sexual purpose or reasonably construed for a sexual purpose.”

The prosecuting attorney discussed ways to determine intent, and said, “you have to look at [a person’s] actions and their words and their deeds to determine a person’s intent or their meaning.” The prosecutor then offered the remarks that defendant asserts were misconduct. Considered in context, the prosecuting attorney’s comments do not reflect an attempt to shift the burden of proof or to highlight defendant’s decision not to testify. Instead, the remarks were

argument that defendant touched the victims for a sexual purpose. This was argument from the evidence and its reasonable inferences, emphasizing that defendant did not have a medical or other non-sexual purpose to be touching any of the victims' genitals.

Defendant argues that the commentary drew attention to defendant's not having presented evidence of his innocence. We disagree. The prosecuting attorney was obligated to establish each element beyond a reasonable doubt, including that the alleged touching was done for a sexual purpose. See *Likine*, 492 Mich at 407. Although argument about lack of evidence of proper purpose for such touching could seem to hint at defendant's disinclination to testify, there was no direct comment on defendant's not having testified or otherwise presented evidence. In context the challenged comments related to elements of the crime, not defendant's lack of testimony.

Moreover, "[j]urors are presumed to follow instructions, and instructions are presumed to cure most errors." *People v Petri*, 279 Mich App 407, 414; 760 NW2d 882 (2008). In this case, the trial court instructed the jury that defendant was presumed innocent and could only be found guilty if the jury was convinced beyond a reasonable doubt defendant was guilty of each element of each crime. The jury was also informed that the prosecuting attorney was responsible for proving every element beyond a reasonable doubt and defendant did not have to prove his innocence or anything else. Further, the trial court instructed the jury that defendant had the right to not testify, and that his decision in that regard must not affect the jury's determination of guilt.

The jury was thus fully instructed on the prosecutor's burden of proof and on defendant's lack of any such burden. To whatever extent any of the challenged comments might be considered erroneous, any error was cured by the trial court's jury instructions. *Petri*, 279 Mich App at 414. Additionally, defendant does not assert that the instructions were defective, or that there is reason to doubt that the jury followed them. Therefore, as defendant has brought no evidence of prosecutorial misconduct denying him fair and impartial trial, no plain error affecting defendant's substantial rights exists. See *Brown*, 279 Mich App at 134.

Defendant discusses a mysterious telephone call the trial judge received while the jury was deliberating. On the day the jury reached its verdict, the judge disclosed that he had received the call the night before. The judge did not disclose the identity of the caller but reported that the caller stated that the prosecuting attorney was accusing him of improper communications with the jury and planned to file a grievance against him with the Judicial Tenure Commission. The prosecuting attorney denied making any such comment, and her supervisor confirmed that there would be no formal grievance. The trial judge admitted exchanging a few comments with a juror concerning the court's recording system, and neither party showed any concern about improper communications with the jury.

Defense counsel initially requested an inquiry into whether the caller received information from a juror, and the judge expressed an intention to question the jurors after the verdict was in. The judge took no such action, and neither attorney again made issue of the matter. In fact, defense counsel stated, "If you're convinced that there is no connection from that call to this jury then I'll take, that's fine with me. That's all the inquiry I desire to make." With this affirmative waiver, counsel extinguished appellate objections over the trial judge's

disinclination to investigate further. See *People v Carter*, 462 Mich 206, 214-216; 612 NW2d 144 (2000). No relief would be warranted in any event.

Finally, defendant argues that defense counsel was ineffective for failing to object to the alleged prosecutorial misconduct, and also for failing to demand a full investigation into the alleged extraneous influence. But, as discussed, defendant has failed to provide evidence of either prosecutorial misconduct or an extraneous influence on the jury. Declining to raise a futile objection or otherwise advance a meritless position does not constitute ineffective assistance of counsel. *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010). Because defendant builds his ineffective assistance argument on defense counsel's disinclination to raise objections over matters we have determined were not error in the first instance, his claim of ineffective assistance cannot stand.

Affirmed.

/s/ Amy Ronayne Krause
/s/ E. Thomas Fitzgerald
/s/ William C. Whitbeck